

Montgomery Ward & Co., Incorporated and Warehouse Employees Local Union No. 730 of the Metropolitan Area of Washington, D.C. and Vicinity a/w International Brotherhood of Teamsters, AFL-CIO.¹ Case 5-CA-22686

April 19, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On April 6, 1993, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed cross-exceptions and a supporting brief, and briefs in response to the General Counsel's and Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings,² findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

The Respondent operates distribution facilities that supply merchandise to its retail stores. In January 1992,³ the Respondent opened a distribution center in Brandywine, Maryland, to service 39 retail stores in the Metropolitan Washington, D.C. area. Brandywine, a 600,000-square-foot facility, has 200 loading docks and approximately 200 employees.

The Brandywine facility replaced distribution facilities in Laurel and Baltimore, Maryland, which the Respondent closed. Although some employees from the unrepresented Laurel facility and the Union-represented Baltimore facility transferred to Brandywine, 70 percent of the Brandywine employees were new hires.

The Union began an organizing campaign before Brandywine opened. In January or February, the Union began leafleting the Brandywine parking lot and distributing authorization cards to the Respondent's employees.

¹ The name of the Charging Party has been changed to reflect the official name of the International Union.

² The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ All dates are in 1992, unless otherwise indicated.

The Respondent knew of the Union's organizing activity. As discussed below, the Respondent held meetings in late February and March to inform employees that it opposed union representation. In addition, on March 20, the Respondent distributed a memo to all employees urging them not to sign union authorization cards.

II. THE 8(A)(1) ALLEGATIONS

About late February, the Respondent held a meeting of all Brandywine employees. This meeting was conducted by Thomas Cato, the Respondent's vice president of logistics in charge of its distribution centers; James Schmitt, manager of the Brandywine facility and East Coast distribution facilities; and Brandywine operating manager, Mike Cardamone. In the meeting, Cato congratulated the employees for their hard work and said that he looked forward to a fruitful working relationship. Cato told employees that they could resolve any problems they had among themselves without third-party representation, stating, "We don't need no other third-party or organization come in here over my dead body."⁴

In mid-March, Cato conducted a series of group meetings for Brandywine employees. In these meetings, which were attended by Schmitt and Cardamone, Cato compared the Brandywine benefits to those at the Baltimore facility. Cato also discussed the Union's organizing drive, authorization cards it was distributing, and the procedures for a Board election. In one of the meetings, which was attended by about 60 employees, Cato further stated that "there would be blood on the floor before the Union came in."

The General Counsel contends that Cato's "over my dead body" and "blood on the floor" statements interfered with employees' Section 7 rights in violation of Section 8(a)(1). Although the judge found these statements, uttered by the "ultimate supervisor of over 7,000 employees," bespoke "the rawest variety of anti-union animus," he concluded that they were not encompassed by the complaint. Accordingly, he recommended dismissing the 8(a)(1) allegations.

The General Counsel excepts, arguing that Cato's comments unlawfully threatened strikes and violence and predicted that it would be futile for employees to select the Union, as alleged in paragraphs 5(b) and (c) of the complaint. The General Counsel additionally argues that Cato's statements were fully litigated. For the following reasons, we find merit in the General Counsel's argument that Cato's statements were unlawful predictions of futility.⁵

⁴ In his recitation of Cato's statement in sec. II.A.2, par. 4, of his decision, the judge omitted the phrase "or organization."

⁵ We do not pass on the issue of whether these statements were also threats of strikes and violence.

Initially, we find that Cato's "over my dead body" and "blood on the floor" statements unlawfully conveyed to employees the futility of selecting the Union, as alleged in paragraph 5(c) of the complaint.⁶ In comparable circumstances, the Board has found unlawful threats of futility where employers told employees that: "the union is not going to come in here, not even by force";⁷ it would "sooner die than let the Union in";⁸ and it would be unionized "over my dead body."⁹

We also agree with the counsel for the General Counsel that these statements were fully litigated. In addition to the complaint allegations, the General Counsel argued in her opening statement that the Respondent told employees at a meeting that Brandywine would be unionized over its dead body. Thereafter, witnesses for the General Counsel and Respondent testified and were cross-examined about Cato's comments at the employee meetings.

In these circumstances, we find that Cato's "blood on the floor," and "over my dead body" statements unlawfully implied to employees that it would be futile to select the Union, in violation of Section 8(a)(1).

III. THE 8(A)(3) DISCHARGES

A. Dennis Guss

1. Background

The Respondent fills between 1500 and 3000 orders daily at the Brandywine facility for shipment to its area retail stores. The Respondent employs approximately 16 warehouse employees, or "order fillers," to fill these orders. The order fillers are under the supervision of Manager Todd Lennox and two group heads. Initially, Pat Proctor was the sole group head. In approximately late March, Ruth Culver also became a group head.

Each day, order fillers are provided with "picking tickets" of merchandise they are to pull. Order fillers are required to initial their tickets, for purposes of accountability. When picking tickets are lost, supervisors track down the tickets and return them to the responsible warehouse employees. According to the Respondent, lost tickets were a problem at the Brandywine facility. As a consequence, the Respondent purportedly reminded warehouse employees at least twice weekly that they were responsible for their tickets.

After securing their tickets, order fillers are responsible for locating ordered merchandise, affixing the

ticket to it, and transporting the ticketed merchandise to the appropriate loading bay for truck delivery. Order fillers place small merchandise on an overhead conveyor system for transport, and use hydraulic equipment to move larger items to shipping lanes adjacent to the loading bay.

The Respondent claims that its goal was to have warehouse employees pick 30 pieces of merchandise per hour. It acknowledges that in April not all warehouse employees had met this goal.

2. Guss' employment

On February 24, the Respondent hired Dennis Guss as an order filler in its Brandywine facility.¹⁰ In addition to filling orders, Guss helped unload incoming trucks, worked in the security cage with "top dollar" merchandise, and helped load heavy merchandise onto trucks for shipment. Only Guss' ticketed work was tabulated when computing his hourly production.

Lennox frequently told Guss he did good work. About 3 weeks before his April 17 discharge, Lennox asked Guss to work with an employee who had damaged a significant amount of merchandise while moving it, and to report back on this employee's performance. Guss was also one of the few warehouse employees asked to work overtime almost weekly.

Prior to April 16, Lennox never told Guss that his production level was unsatisfactory. On the contrary, during their only discussion about Guss' productivity, Guss said his average was pretty good considering the additional duties Lennox gave him, and the fact that Guss' hydraulic equipment frequently was unavailable. Lennox agreed.

3. Guss' union activities

In April, at the Union's request, Guss encouraged Brandywine employees to attend an organizing meeting. Guss spoke with 18 to 24 employees about the meeting at lunchtime in the employees' cafeteria, and after work in the Brandywine parking lot.

Guss and fellow employees Groenwoldt and Hollingsworth attended the Union's April 13 organizing meeting. At this meeting, held at a nearby motel, Guss signed an authorization card and received cards to distribute to other employees. At the meeting, the Union proposed writing the Respondent that the three employees were on its organizing committee. The employees declined, saying that they did not want the Respondent to know of their activities.

⁶Par. 5(c) alleges that the Respondent violated Sec. 8(a)(1) about March 9, 1992, when Cato "[i]nformed its employees that it would be futile for them to select a union as their bargaining representative."

⁷*Marcar Industrial Uniform Co.*, 306 NLRB 27 fn. 1 (1992).

⁸*Money Radio*, 297 NLRB 698, 702 (1990).

⁹*South Nassau Communities Hospital*, 262 NLRB 1166, 1175 (1982).

¹⁰New employees were on probation for 90 days. Although an employee's probationary status may sometimes have a strong bearing on the question whether his or her discharge was unlawful, we agree with the judge that the fact that Guss was a probationary employee is irrelevant in evaluating whether the Respondent unlawfully discharged him for engaging in union activities.

Thereafter, however, beginning April 14, Guss discussed the Union with 18 to 20 employees in the cafeteria at lunch and in the parking lot after work. Guss also distributed about six to eight authorization cards to employees. After a couple of days, Guss informed the Union that he and Groenwoldt wanted to “cool it for awhile” because they thought that the Respondent was watching them more closely.

4. Events of April 16 and 17

On April 16, Lennox called Guss into his office. Group Head Culver was also present.¹¹ Lennox told Guss that Culver was having trouble getting him to follow her instructions. Guss responded that he was helping other people in the shipping department and taking tickets from other order fillers. Lennox said that it was Guss’ responsibility to pull orders and make sure that he was credited for additional work.¹² Lennox also said that Guss was pulling 16.08 pieces per hour and that his production should increase to 20 to 25 pieces hourly. At the end of the meeting, Lennox told Guss that he had not made a decision what to do about this matter.

After the April 16 meeting, Culver told Guss she was not trying to be difficult. Guss said that he would comply with Culver’s requests, and she responded that everything was fine.

On April 17, Guss misplaced two picking tickets. While Guss was searching for the lost tickets, Culver returned them to him without comment.¹³ Guss worked

the remainder of his shift without incident. Before quitting time, Culver asked Guss to work overtime the next day.

After Guss’ shift ended, Lennox paged him. When Guss arrived at his office, Lennox invited him outside for a cigarette. Once outside, a shaking Lennox told Guss, “This is from the man up above. I have to let you go.” When Guss responded, “This is bullshit,” Lennox replied, “I know it is bullshit, but the man up above said I have to let you go.” Guss asked to speak to Cardamone, the “man up above” to whom Lennox referred.

Lennox took Guss to Cardamone’s office and directed him to wait outside. Several minutes later, Guss was admitted to the office where Cardamone told him he was terminated. When Guss asked for another chance, citing instances where other employees had made mistakes, Cardamone said, “Nope, you’re gone, bye.”

The Respondent wrote on Guss’ termination notice that he was discharged for failing to follow instructions, productivity, and lost tickets. “Lost tickets” purportedly referred to the two tickets Guss misplaced on April 17, as well as another ticket that the Respondent claims Guss lost about 3 weeks before his discharge. Guss testified that he did not remember losing tickets before April 17 and that the Respondent never spoke to him about lost tickets prior to that date.

B. Paul Groenwoldt

1. Background

In addition to order fillers, the Respondent employs “loaders” to move merchandise from the overhead conveyor system and shipping lanes and load it onto trucks for transport. Before loading merchandise from either source, loaders are required to scan bar codes on picking tickets affixed to the merchandise with an electronic “gun.” This scan records the item’s withdrawal from the Brandywine inventory, and its shipment to a retail store. Loaders have also been directed to draw a red line through the bar code after scanning an item to verify that it has been scanned.

Loaders scan tickets on smaller merchandise as it is removed from the conveyor belts. Initially, loaders were also permitted to scan tickets on large items in the shipping lanes where the order fillers deposited them.¹⁴ Because of inventory problems, however, the Respondent painted red squares on the floor adjacent to the various loading bays about April 1, and in-

¹¹ Prior to the April 16 meeting, Guss had not been informed that Culver was his group head. However, Culver had given Guss instructions twice before this meeting. About a week before his discharge, Culver told Guss to stack merchandise higher in the lanes. On a second occasion, Culver instructed Guss to place returned merchandise back in stock. Guss complied with both requests.

¹² Lennox admitted that he sometimes transferred work from one order filler to another. Lennox testified that in these instances he left it to the employee reassigned the work to make sure that he or she was credited with the ticket. There is no evidence, however, that prior to his April 16 meeting Lennox informed employees that they had this responsibility.

¹³ Culver testified that another employee found Guss’ lost tickets and gave them to her. Culver said that, following standard procedure, she then photocopied the tickets and gave the originals and copies to Lennox. Culver further testified, however, that although sometimes as many as one or two tickets were lost daily, she had never photocopied a lost ticket, and could not identify any employee besides Guss who had ever lost a ticket.

Lennox conversely testified that an employee handed him Guss’ lost tickets, and that he gave them to Culver for duplication. Lennox further averred that he then called Guss into his office, gave him the lost tickets, and reminded him of the importance of tickets. Lennox testified that he then spoke to Operating Manager Cardamone about the matter.

In crediting Guss, the judge found that Culver’s and Lennox’s testimony was conflicting, evasive, and demonstrated that the Respondent had no procedure for copying lost tickets. The judge additionally found, and we agree, that Culver’s and Lennox’s discredited testimony demonstrates the Respondent’s “extraordinary exercise in

case-building” when documenting Guss’ (admitted) error in losing the picking tickets.

¹⁴ After scanning, the loaders place the merchandise on hand-trucks, pallet jacks, or forklifts and load it onto the trucks.

structed loaders to scan merchandise from the shipping lanes in the appropriate square.¹⁵

In addition to ensuring that merchandise is properly scanned, loaders are responsible for ensuring that the conveyor system does not back up. If merchandise is not removed from the conveyor as it passes, it recirculates throughout the system. Occasionally, this recirculation causes backups which jam the system. When this occurs, a red light flashes and personnel are required to clear the blockage. The Respondent has repeatedly instructed loaders that they are not to let the red light flash. Indeed, Operating Manager Cardamone regularly cautioned employees to make sure their red lights are off, to scan merchandise in the square, and to position items so that the bar codes are visible to auditors at the loading bays.

2. Groenwoldt's employment

On February 21, the Respondent hired Paul Groenwoldt as an order filler. Within a few weeks, Groenwoldt was transferred to the shipping department, as a loader, under Supervisor Gottshall. When Groenwoldt started as a loader, he was trained to scan large merchandise in the lanes. After the Respondent instituted its "red box" system, Groenwoldt was instructed in this new procedure. Thereafter, Groenwoldt scanned in the square about half of the time. The remainder of the time he scanned in the lanes when they were backed up, and in order to prevent the red light from flashing. Groenwoldt testified that he frequently observed other loaders scanning large merchandise outside the red squares.

Groenwoldt testified, without contradiction, that Gottshall frequently told him he was doing a good job. Groenwoldt's personnel files contained no warnings or evidence of other discipline.

3. Groenwoldt's union activities

In April, Guss talked to Groenwoldt at work about the April 13 union meeting. Groenwoldt attended the meeting with employees Guss and Hollingsworth, signed an authorization card, and took blank cards to distribute to other employees. Beginning April 14, Groenwoldt talked to six or seven employees about the Union and encouraged them to sign authorization cards.¹⁶ These discussions took place at the Brandywine facility at lunch and after work. After April 14, Groenwoldt testified that he and Guss decided to tone down their union activities during their probationary

periods, because members of management were in their work areas much more often than usual.

4. Events of April 12 and 15

On April 12 or 13, Cardamone observed a loader, Tate, scanning several items in the shipping lanes instead of in the red box. Cardamone reprimanded Tate, stressed the seriousness of his offense, and told him that he could be terminated if he continued scanning outside the square. Cardamone testified that he repeated his instructions and warnings to Tate to stress the seriousness of Tate's conduct.

About April 15, Cardamone and Facility Manager Schmitt observed Groenwoldt scan an item outside the square. Cardamone reminded Groenwoldt about proper scanning procedure, and asked him if he understood his training.

5. Events of April 17

On April 17, Gottshall moved Groenwoldt from his usual loading area to two busier lanes which Groenwoldt knew could be watched by the Respondent's closed-circuit camera system. Gottshall also told Groenwoldt that Cardamone wanted to see him at the end of his shift.

Brandywine Manager Schmitt has a monitor for the closed-circuit camera system in his office. With this monitor, Schmitt can view the entire facility—inside and out—except for the offices and restrooms. On the afternoon of April 17, Schmitt testified that he "happened to observe" Groenwoldt on the monitor, scanning items outside the red square.¹⁷ Schmitt instructed Cardamone to discharge Groenwoldt.

When Groenwoldt reported to Cardamone's office after work on April 17, he observed Guss being ushered out exclaiming, "This is bullshit." When Groenwoldt entered the office, Cardamone read him a notice of discharge stating that, despite repeated instructions on proper scanning procedures, Groenwoldt was observed scanning outside the red squares on April 15 and 17. When Groenwoldt offered to do better, Cardamone exclaimed, "No you won't." Groenwoldt then signed the termination notice, writing "Teamsters" below his signature. Groenwoldt pushed the notice toward Cardamone, asking, "Is this the reason I'm being fired?" Cardamone muttered a response that Groenwoldt did not understand.¹⁸

¹⁵ The Respondent asserts that during Brandywine's first 6 months of operations, approximately \$300,000 worth of merchandise was not scanned before shipment. The Respondent claims that this amount of unscanned merchandise was 10 times higher than at its other distribution facilities.

¹⁶ There is no evidence that Hollingsworth—who was still employed by the Respondent at the time of the hearing—engaged in union activities after the April 13 union meeting.

¹⁷ The judge stated that Schmitt presumably was watching all loaders on April 17. The General Counsel excepts that there is no evidence to support this assumption. We agree. Despite Schmitt's testimony that he frequently watched his monitor screen, he did not claim that he observed anyone other than Groenwoldt on April 17.

¹⁸ The judge found that there was no evidence that Cardamone read Groenwoldt's "Teamsters" notation before responding to his question or that, even if he did, his response was to that notation

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C. Judge's Findings

The Respondent argued that it discharged Guss because he: (1) would not follow instructions from Group Leader Culver; (2) was slow in filling orders; (3) lost a picking ticket 3 weeks before his discharge; and (4) lost two picking tickets on April 17. The judge found the Respondent's purported rationale for firing Guss was a "fabrication of the first order"—as acknowledged by Lennox to Guss, and was supported by "undoubtedly perjurious" testimony.¹⁹ Additionally, the judge concluded that the Respondent had discriminated against Guss and had demonstrated virulent antiunion animus at its highest levels.

Regarding Groenwoldt, the judge initially concluded that his failure to scan in the red squares was improper, even if other employees also had failed to do so. The judge further found, however, that Cardamone gave no warning to Groenwoldt on April 15 comparable to that given Tate. Thus, instead of repeatedly warning Groenwoldt about the seriousness of scanning outside the box and admonishing him that a further infraction would result in his discharge—as it had done with Tate—Cardamone merely reminded Groenwoldt of proper scanning procedure on April 15.

The judge next determined that the clear implication of Groenwoldt's reassignment to busier lanes on April 17, and Gottshall's statement that Cardamone wanted to see him at the end of the day, was that Groenwoldt was being setup for discipline. This setup succeeded when Schmitt "happened to observe" Groenwoldt on the closed-circuit monitor scanning outside the box, and directed Cardamone to discharge Groenwoldt. The judge found that Cardamone carried out these instructions even though he knew that Groenwoldt had not received the same categorical warning afforded Tate.

Although the judge found that Guss and Groenwoldt: (1) engaged in union activities; (2) were discriminated against by the Respondent shortly after engaging in these activities; and (3) that the Respondent demonstrated strong antiunion animus, at its highest corporate levels, he nonetheless recommended dismissing allegations that their discharges violated Section 8(a)(3) and (1). The judge found that a requisite element of the General Counsel's *prima facie* case was evidence that the Respondent *knew* of Guss' and Groenwoldt's union activities. As he found no evidence of knowledge, the judge concluded that he was constrained to dismiss these 8(a)(3) and (1) allega-

tions.²⁰ Relying on *Pizza Crust Co.*, 286 NLRB 490 (1987), the judge found that although the Respondent's asserted grounds for firing Guss and Groenwoldt were "incredible," Guss and Groenwoldt intentionally kept their union activities covert and there was no evidence that the Respondent had learned of these activities. The judge also distinguished *Abbey's Transportation Services*, 284 NLRB 698 (1987), *enfd.* 837 F.2d 575 (2d Cir. 1988), on which the General Counsel relied. The judge found that in *Abbey's Transportation*, *supra*: (1) the employees' union activities were more substantial than Guss' and Groenwoldt's; (2) the employees did not attempt to shield these activities; and (3) the employees were jointly terminated promptly after engaging in protected activity. Although the judge acknowledged that Guss and Groenwoldt were terminated one after the other on April 17, both in Cardamone's office, he found that that was coincidental. He found that Guss and Groenwoldt were discharged for different reasons and that Guss would not have been terminated on the same day as Groenwoldt had he not lost picking tickets on that date, and had Guss not requested to go to Cardamone's office.

D. Exceptions

The General Counsel and the Charging Party except to the judge's recommended dismissal of the 8(a)(3) allegations. The General Counsel contends that, as in *Abbey's Transportation*, *supra*, the Board should infer from all of the circumstances that the Respondent knew of Guss' and Groenwoldt's protected union activities and find that the Respondent unlawfully terminated them for this reason. The General Counsel distinguishes *Pizza Crust*, *supra*, stating that it was litigated under a "small plant" theory, not here alleged. The General Counsel further asserts that, unlike *Pizza Crust*, *supra*, where there was no evidence of antiunion animus, here Respondent's vice president, Cato, had made virulent unlawful threats to employees in February and March preceding the discharges, and that the Respondent further demonstrated its animus through the March 20 memo requesting employees not to sign union authorization cards. Finally, the General Counsel argues that unlike in *Pizza Crust*, *supra*, Guss' and Groenwoldt's union activities were not covert. Thus, although Guss and Groenwoldt told the Union on April 13 that they did not want the Respondent to know about their union activities, the General Counsel argues that they nonetheless openly demonstrated union support. The General Counsel notes that Guss publicly requested information from Cato about union benefits at an employee meeting, openly discussed the Union with

rather than the written reasons on the notice for Groenwoldt's discharge.

¹⁹ The judge found it incredible that the Respondent could simultaneously claim that the lost ticket problem was so significant that management held almost daily conferences with employees on the subject and that Guss was the only employee that it ever caught losing tickets.

²⁰ The judge stated that "the Board has never held that knowledge of some union activity by some employees creates a presumption of knowledge of the protected activities of any employee who engages in protected activities and who is discharged for pretextual reasons."

many employees at work, and passed out authorization cards to coworkers. The General Counsel also contends that Groenwoldt accepted literature from the Union outside the facility and openly discussed the Union with employees at work. Indeed, argues the General Counsel, both Guss and Groenwoldt testified that they had curtailed their union activities precisely because of increased supervisory presence in their work area and because they had concluded that they were being watched.

The General Counsel additionally argues that given the pretextual nature of the Respondent's asserted reason for discharging Guss and Groenwoldt, the Board should infer that its actual motive was hostility towards their union activities. *Whitesville Mill Service Co.*, 307 NLRB 937 (1992); *De Jana Industries*, 305 NLRB 845 (1991).

The Respondent cross-excepts, disputing the judge's credibility resolutions, and arguing that it did not demonstrate antiunion animus. The Respondent contends that Guss and Groenwoldt were not discriminated against, and that the judge improperly rejected evidence concerning other discharged probationary employees.

We reject the Respondent's cross-exceptions and find, for the reasons fully stated by the judge, that it discriminated against Guss and Groenwoldt in discharging them. Although the judge found that the Respondent "discriminated" against the two employees in discharging them, he nonetheless found no violation. We disagree. We recognize that the term "discrimination," in context, means only that the two employees were treated differently from other employees. In order to establish a violation of Section 8(a)(3), it must be shown that the Respondent treated them differently *because of their union activities*. In the judge's view, this showing was not made because the General Counsel never showed that the Respondent *knew* of the union activities of these two employees. As set forth below, however, we agree with the General Counsel and the Charging Party that the evidence warrants the inference that the Respondent knew of Guss' and Groenwoldt's union activities and, accordingly, that their discharges were unlawfully motivated.

E. Analysis

Initially, we agree with the judge that a prerequisite to establishing that Guss and Groenwoldt were wrongfully discharged is finding that the Respondent knew of their union activities. *Mack's Supermarkets*, 288 NLRB 1082, 1101 (1988). This "knowledge" need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn. *Greco & Haines, Inc.*, 306 NLRB 634 (1992); *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985); *Coca-*

Cola Bottling Co. of Miami, 237 NLRB 936, 944 (1978). Indeed, the Board has inferred knowledge based on such circumstantial evidence as: (1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment. *Greco & Haines*, supra; *E. Mishan & Sons*, 242 NLRB 1344, 1345 (1979); *General Iron Corp.*, 218 NLRB 770, 778 (1975). The Board additionally has relied on factors including the delay between the conduct cited by the respondent as the basis for the discipline and the actual discharge, and—in the case of multiple discriminatees—that the discriminatees were simultaneously discharged. See, e.g., *Darbar Indian Restaurant*, 288 NLRB 545 (1988); *Abbey's Transportation Services*, supra.

Finally, the Board has inferred knowledge where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive. *Whitesville Mill Service Co.*, supra; *De Jana Industries*, 305 NLRB at 849; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." See generally *General Films*, 307 NLRB 465, 468 (1992).

The factors on which the Board relies when inferring knowledge do not exist in isolation, but frequently coexist.²¹ For example, in *BMD Sportswear Corp.*, 283 NLRB 142, 142–143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988), the Board reversed the judge and found that the General Counsel had established that alleged discriminatees were unlawfully laid off, even in the absence of direct evidence that the employer knew of their union activities. There the respondent had demonstrated antiunion animus, discriminated against other employees, proffered unsubstantiated reasons for the layoff, and the layoffs were proximate to the start of the union organizing campaign. See also *Active Transportation*, 296 NLRB 431, 432 (1989), enfd. 924 F.2d 1057 (6th Cir. 1991).

Applying the above criteria, we find, contrary to the judge, that compelling circumstantial evidence warrants the inference that the Respondent knew of Guss' and Groenwoldt's union activities, and that it discharged them because of those activities in violation of Section 8(a)(3) and (1).

Initially, we note that, unlike *Pizza Crust*, supra, there is ample evidence here that the Respondent knew generally of the Union's organizing efforts. Even before the Respondent opened the Brandywine facility, it

²¹ In *Raysel-IDE, Inc.*, 284 NLRB 879, 880 (1987), the Board found that timing alone was an insufficient basis for inferring knowledge.

was aware that the Union had commenced an organizing campaign. In response to this campaign, the Respondent held meetings with its newly hired employees, telling them that they did not need union representation, and wrote employees in March urging them not to sign authorization cards that the Union was distributing.

When urging its employees to eschew union representation, the Respondent also displayed strong antiunion animus at its highest corporate levels. Cato graphically threatened employees that it would be futile to select the Union, stating that the Union would come in “over his dead body,” and that there “would be blood on the floor” before the Union came in. Significantly, Schmitt and Cardamone, the Brandywine officials responsible for discharging Groenwoldt and Guss, attended the meetings where their superior, Vice President Cato, voiced this vehement, unlawful, antiunion animus.²²

Next, the evidence establishes that Guss and Groenwoldt engaged in protected union activities at the Brandywine facility. Guss openly solicited 18 to 24 employees at work to attend the April 13 union meeting, and both he and Groenwoldt attended this meeting. Although Guss and Groenwoldt told the Union that they did not want the Respondent to learn of their union activities, we agree with the General Counsel that *Pizza Crust*, supra, is distinguishable. In *Pizza Crust*, supra, the alleged discriminatees were instructed by the union to keep their organizing activities covert, the employees attempted to heed these instructions, and, indeed, the employees had no evidence that supervisors observed their union activities. Here, notwithstanding their April 13 statements to the Union, Guss and Groenwoldt thereafter talked to employees about the Union in the lunchroom and parking lot, and urged employees to sign authorization cards. Indeed, only after Guss spoke with 18 to 20 employees at work and distributed 6 to 8 cards, and after Groenwoldt talked to 6 or 7 employees, did they halt these activities, telling the Union that more supervisors were in the work area and that they felt that they were being watched.²³

²² Although we find that the Respondent’s March 20 memo to employees, urging them not to sign authorization cards, is evidence that the Respondent generally knew of the Union’s organizing campaign, we reject the General Counsel’s argument that it additionally evidences the Respondent’s antiunion animus.

²³ This case is also distinguishable from *Goldtex, Inc. v. NLRB*, 14 F.3d 1008 (4th Cir. 1994), in which the Fourth Circuit recently reversed the Board’s inference that the respondent knew that the employees it discharged had engaged in union activities. In *Goldtex*, the court found no evidence that two of the discriminatees even supported the union—much less that the respondent knew of this support. As to a third alleged discriminatee, the court found that his only expression of union support was too attenuated, as it predated his discharge by nearly 2 years. Here, in sharp contrast, Guss and Groenwoldt engaged in union activities within days of their discharge.

Significantly, unlike *Pizza Crust*, supra, the Respondent also has the technology to watch, and does watch, employees throughout its facility. Plant Manager Schmitt testified that the Respondent maintains a closed-circuit television system which monitors the entire facility, inside and out, except restrooms and offices. Schmitt admitted that he frequently watched employees on the monitor in his office; indeed, it was Schmitt’s observation of Groenwoldt which the Respondent cites as a basis for his discharge. Further, Guss’ and Groenwoldt’s union activities occurred in areas the Respondent can, and does, monitor.²⁴

We find that the timing of Guss’ and Groenwoldt’s discharges further supports an inference that their terminations were unlawfully motivated. *Abbey’s Transportation*, supra. Thus, within a few days after Guss and Groenwoldt solicited coworkers to support the Union, both employees—the only two organizing on the Union’s behalf—were discharged on the same day, one immediately after the other. *Id.* The judge distinguished this case from *Abbey’s Transportation*, supra, noting that there the Board relied heavily on the fact that the discriminatees were called into the respondent’s office at the same time and discharged virtually simultaneously. We do not find that these facts meaningfully distinguish *Abbey’s Transportation*, supra, from this case. Thus, in both cases, the leading employee organizers (indeed, here, the only union organizers) were discharged ostensibly for different reasons, promptly after engaging in union activities, and the terminations were handed down by the same person, if not literally simultaneously, at least virtually so.²⁵

Finally, we agree with the judge that the Respondent’s proffered reasons for discharging Guss and Groenwoldt were pretextual. With regard to Guss, we note particularly that before his union activities, his work and production levels had not been questioned. Indeed, Guss was frequently praised by his supervisor, was offered overtime more often than most warehouse employees, and his supervisor acknowledged that his production levels were satisfactory. It was not until Guss solicited employees on behalf of the Union that the Respondent discharged him, relying on: (1) a picking ticket that Guss purportedly had lost 3 weeks earlier—which it had never brought to Guss’ attention; (2) Guss’ repeated failure to follow his leadperson’s directions—which allegation the judge discredited; and (3) Guss’ losing two picking tickets on April 17, for

²⁴ Indeed, at the hearing, the Respondent’s attorney asked Guss whether he and Groenwoldt exchanged “high fives” in the Respondent’s parking lot immediately after their discharges, illustrating both the Respondent’s ability and tendency to monitor its employees, in and outside its facility.

²⁵ Indeed, in *Abbey’s Transportation*, supra, there was no evidence of antiunion animus, which we find clearly established by direct evidence in this case.

which the Respondent engaged in an “extraordinary exercise in case-building” in order to justify Guss’ discharge. As to Guss’ lost tickets, the judge found, and we agree, that it is “incredible” for the Respondent to argue that lost picking tickets were a chronic problem, requiring at least twice weekly meetings, but that Guss was the only employee who had ever been detected losing tickets. Finally, we note that Guss’ own supervisor admitted that his firing was “bullshit.”

As to Groenwoldt, we find that the Respondent would not have discharged him for failing to observe the scanning-in-the-squares requirement were it not for his recent union activities, because his testimony and the evidence concerning the Respondent’s pervasive television monitoring system support the inference that the discharge amounted to disparate treatment. Groenwoldt testified that after meetings at which the employees had been advised about the scanning policy, he observed other employees scanning in the squares only about 50 percent of the time, as he was doing. All of the employees worked under the eye of the Respondent’s surveillance cameras, because Schmitt, the Respondent’s Brandywine manager testified that he has a television monitor in his office that permits him to see “anywhere within the building, inside and out, except the office area and the restrooms.” In presenting Schmitt as a witness, the Respondent did not seek to elicit from him any testimony denying Groenwoldt’s testimony concerning the scanning patterns of other employees. In sum, in finding disparate treatment, we do not rely solely on the lesser discipline given to Tate (a warning) for scanning outside the squares.²⁶

Furthermore, we find that the events occurring on the day Groenwoldt was discharged were indicative of a setup. When he first came in that day, the Respondent arranged in advance for him to meet with Operating Manager Cardamone after his shift. He was then assigned to the busy lanes, in which he would be caught between the requirement to scan quickly so as to avoid backups which triggered the red light and the requirement to move large items over to the red squares and scan them there, which was more time-consuming than scanning in the shipping lanes. Then Brandywine Manager Schmitt just “happened to observe” Groenwoldt scanning in the shipping lanes and ordered his immediate termination, which Cardamone

conveyed to him at the prearranged meeting after his shift. We do not agree with our dissenting colleague that the impact of the Respondent’s assignment of Groenwoldt to busier shipping lanes on the day of his discharge is somehow beyond our purview in analyzing the motive for the discharge simply because the General Counsel failed to allege the assignment as a separate unfair labor practice. The assignment is part of the res gestae of the discharge under the General Counsel’s theory. In other words, we are not—as our dissenting colleague seems to imply—expressing our approval of any employee’s willful failure to follow instructions. We are simply finding, considering all the relevant evidence, that the Respondent discharged Groenwoldt for a work error that it had reason to know was committed by other employees, and it singled him out for discharge for this failure because of his recent onsite solicitation of fellow employees to sign union authorization cards.

In sum, under the “confluence of circumstances”²⁷ in this case, including the facts that the Respondent knew of the Union’s organizing campaign, responded with unlawful antiunion animus, and discharged Guss and Groenwoldt for “incredible” reasons promptly after both employees engaged in union activities at work, we infer that the Respondent knew of their union activities. Under these facts, we reverse the judge and find that the General Counsel made out a prima facie case that Guss and Groenwoldt were unlawfully discharged. Further, because the judge properly rejected the Respondent’s purported rationale for discharging both employees, we find that the Respondent failed to establish that it would have discharged Guss and Groenwoldt even in the absence of their union activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by discharging Guss and Groenwoldt.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent, by its agents, violated Section 8(a)(1) by telling employees that the Union would come in “over [its] dead body,” and that there would be “blood on the floor before the Union came in,” thereby implying that it would futile for the employees to select union representation.
4. The Respondent violated Section 8(a)(3) and (1) by terminating Dennis Guss and Paul Groenwoldt on

²⁶ We do not agree with our dissenting colleague that the judge “chose not to credit” Groenwoldt’s testimony concerning the observable practices of other employees with respect to scanning outside the square. Groenwoldt was a witness whom the judge generally credited, even when his testimony conflicted with that of the Respondent’s witnesses. That the judge did not make an express credibility finding concerning this particular testimony of Groenwoldt in no way implies that he found Groenwoldt unbelievable. In view of the absence of squarely conflicting testimony, we believe we are entitled to rely on what Groenwoldt described as the practices of his fellow employees.

²⁷ *Abbey’s Transportation*, supra.

April 17, 1992, because they engaged in union or other protected activities.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make whole Dennis Guss and Paul Groenwoldt for any loss of earnings and other benefits they suffered as a result of unlawfully terminating them. *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest is to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Montgomery Ward & Co., Incorporated, Brandywine, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implying to employees that it will be futile for them to select union representation.

(b) Discharging employees because they engaged in union or other protected activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dennis Guss and Paul Groenwoldt immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Dennis Guss and Paul Groenwoldt whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful discharges and notify Guss and Groenwoldt in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Brandywine facility copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER COHEN, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) by indicating to employees that it would be futile for them to select union representation. I additionally agree, under the circumstances of this case, that the Board properly inferred that the Respondent had knowledge of employee Dennis Guss' union activities, that the General Counsel established a prima facie case that Guss' discharge was unlawful, and that the Respondent failed to establish that it would have discharged Guss even in the absence of these union activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Unlike my colleagues, however, I would not find that the discharge of employee Paul Groenwoldt violated Section 8(a)(3) and (1) of the Act.

As a result of substantial inventory losses due to unscanned merchandise, the Respondent instituted a requirement in the spring of 1992 that its "loader" employees scan large merchandise in red squares adjacent to the loading bays. The Respondent trained its loaders in this procedure, and reminded them almost daily of this requirement. Groenwoldt, like the Respondent's other loaders, was trained in the new procedure and instructed to scan in the red box. Notwithstanding these instructions, which Groenwoldt admits receiving, he failed to scan in the box at least half of the time. Even after Operating Manager Cardamone warned him on April 15 to follow proper scanning procedure, Groenwoldt continued to disregard the Respondent's directive about 50 percent of the time. Significantly, although Groenwoldt testified that he knew that the lanes to which he was assigned on April 17 could be monitored by the Respondent's closed-circuit camera system, he persisted in improperly scanning outside the square.

²⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Assuming *arguendo* that the General Counsel established a *prima facie* case as to Groenwoldt, I believe that the Respondent established that Groenwoldt would have been discharged in any event for failing to scan properly. My colleagues concede that Groenwoldt engaged in this conduct. They seek to avoid the consequences of this concession by claiming “disparate treatment.” In this regard, they assert that the Respondent knew that other employees similarly scanned outside the “square” but did not discipline them. I find this inference unsupported. Significantly, the judge—whose credibility resolutions my colleagues adopt—chose not to credit Groenwoldt’s uncorroborated claims that other employees scanned outside the square. Instead, the judge concluded that “even if” Groenwoldt’s claims were correct, his persistent failure to follow the Respondent’s repeated scanning instructions “was totally without justification.”

My colleagues further argue that disparate treatment should be inferred because Facility Manager Schmitt did not deny Groenwoldt’s testimony that other employees also scanned outside the square. However, Schmitt testified, without contradiction, that there were two occasions where he *observed* that an employee failed to scan in the square. Groenwoldt was the culprit each time. After the first instance, Schmitt instructed Cardamone to remind Groenwoldt of the proper procedures. Only 2 days later, Schmitt observed Groenwoldt ignoring these specific, personal instructions by repeatedly scanning outside the square. Schmitt, therefore, ordered Groenwoldt discharged. Finally, Operating Manager Cardamone, who frequented the loading areas, testified that the only two employees he ever observed scanning outside the square were Groenwoldt and Tate, whom Cardamone warned.

Based on the above evidence, as well as the fact that the judge, who personally observed all the witnesses, was unwilling to find disparate treatment as to Groenwoldt, I cannot accept my colleagues’ inference.

My colleagues also argue that Groenwoldt was treated differently from employee Tate. I disagree. Unlike the situation with Tate, the Respondent had previously apprised Groenwoldt about the importance of scanning in the red box. Despite this, he repeatedly refused to follow the Respondent’s instructions.

My colleagues contend that the Respondent “set up” Groenwoldt for the discharge. Essential to this setup theory is the notion that the Respondent, for unlawful reasons, assigned Groenwoldt to the busy lanes where he would be more prone to fail to scan. However, the General Counsel does not allege that this assignment was for unlawful reasons. Thus, the essential underpinning for the setup theory is not even alleged.

Based on the above, I would dismiss the allegation that Groenwoldt’s discharge violated Section 8(a)(3) and (1).

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT represent to our employees that it would be futile for them to select the Union as their bargaining representative.

WE WILL NOT discharge or discriminate against any employee because of that employee’s activity on behalf of Warehouse Employees Local Union No. 730 of the Metropolitan Area of Washington, D.C. and Vicinity a/w International Brotherhood of Teamsters, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Dennis Guss and Paul Groenwoldt immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify Dennis Guss and Paul Groenwoldt that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

MONTGOMERY WARD & CO., INCORPORATED

Angela S. Anderson, Esq., for the General Counsel.
Alexandra M. Goddard, Esq., of Chicago, Illinois, for the Respondent.
Elizabeth J. Head, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Washington, D.C., on September 28–29, 1992.¹ The case was initiated by a charge that was filed on April 28 by Warehouse Employees Local Union No. 730, of the Metropolitan Area of Washington, D.C. and Vicinity a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) against Montgomery Ward & Co., Incorporated (the Respondent). The charge was docketed as Case 5–CA–22686. On June 12, on the basis of the charge, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging certain violations of Section 8(a)(1) and (3) of the Act by the Respondent. Respondent filed an answer admitting that this matter is properly before the Board, and admitting the status of certain supervisors under Section 2(11) of the Act, but denying the commission of any unfair labor practices.

The substantive allegations of the complaint are that, at its distribution center, or warehouse, at Brandywine, Maryland (the Brandywine facility) Respondent: (1) in violation of Section 8(a)(1), in March, by its executive vice president for logistics and product service, Tommy Terell Cato, made threats to all Brandywine facility employees; and (2) in violation of Section 8(a)(3), on April 17, Respondent discharged employees Paul Groenwoldt and Dennis Guss because of their activities on behalf of the Union. The threats are denied. The April 17 discharges are admitted; however, Respondent denies knowledge of any union activities by Groenwoldt and Guss before their discharges. Respondent further contends that Guss and Groenwoldt were each discharged solely because they were probationary employees who did not have satisfactory job performance.²

I. JURISDICTION

As the answer admits, Respondent is a corporation that is engaged in the retail sale of merchandise. During the year preceding the issuance of the complaint, in the course of its retail operations, Respondent derived gross revenues in excess of \$500,000; during the same period it sold and shipped from its Brandywine facility products, goods, and materials valued in excess of \$5000 directly to purchasers located at points outside Maryland. On these admissions I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

As the answer further admits, I find and conclude that the Union is a labor organization under Section 2(5) of the Act.

¹ All dates are in 1991, unless otherwise indicated.

² The fact that the alleged discriminatees were probationary employees is essentially irrelevant; probationary employees are fully protected under the Act; moreover, the Board has recognized that probationary employees are sometimes selected for unlawful discrimination because they are the employees who are the most ostensibly vulnerable. *Electro-Wire Truck Products*, 305 NLRB 1015 (1991).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Respondent's operations

Almost everything that is sold in Montgomery Wards' stores is, at one time or another, stored in one of Respondent's 21 distribution centers throughout the United States. The Brandywine facility is one of Respondent's newer distribution centers, having been constructed in 1991. The Brandywine facility initially opened in January, but it did not become fully operational until April. The Brandywine facility is a 600,000-square-foot building that has 200 loading bays. About 200 employees were employed at the building at time of trial.

The Brandywine facility services 39 of Respondent's Washington, D.C. area retail stores and other stores in the mid-Atlantic States; for those stores it receives and stores (for at least 1 day) a \$25 million inventory. It ships the merchandise to the stores on order, and it bills the stores according to its records of what is shipped. Also, the retail stores use copies of the distribution center's shipping records to audit their individual inventory records.

The management of each of Respondent's 21 distribution centers report to Cato. The 21 distribution centers and 150 product centers employ between 6000 and 7000 employees; additionally there are 150 product centers that are Cato's responsibility, as well as various quality assurance and data processing facilities in the United States. Cato's office is at corporate headquarters in Chicago.

James Schmitt, whose office is at the Brandywine facility, is the corporate distribution facility manager for the eastern United States; he reports directly to Cato. Schmitt is also the manager of the Brandywine facility. Reporting directly to Schmitt at the Brandywine facility are an engineering manager and two operating managers, one of whom is Mike Cardamone. Cardamone is responsible for the day-to-day operations of the Brandywine facility; among those reporting directly to Cardamone are Jeff Gotshall, the shipping manager, and Todd Lennox, the order-filling manager.

There was a 90-day probationary period for all employees at the Brandywine facility; Groenwoldt, a loader, was hired on February 21; Guss, a warehouseman, was hired on February 24.

2. Initial union activities and alleged threats

In January and February, nonemployee organizers for the Union distributed flyers in the area of the parking lot at the Brandywine facility.

Groenwoldt testified on direct examination that, shortly after he was hired, Cato conducted a meeting of all Brandywine facility employees. After telling the employees that he was pleased about the progress made in opening the new distribution center, Cato talked about third-party representation of the employees. According to Groenwoldt: "He said we didn't need it there, that all differences we could sort out amongst ourselves."

Groenwoldt further testified on direct examination that, in mid-March, Cato conducted a series of group meetings with

the employees of the different departments. According to Groenwoldt:³

He [Cato] was comparing Union wages versus Brandywine wages, or Montgomery Ward's wages at the Brandywine facility, and he said that there wasn't much difference. He started talking about the authorization cards.

[He said that] the employees need 30% to have⁴ an election by the NLRB, and that management would have a chance to see those cards to see if they had enough.

He said that if he had anything to do with keeping the Union out, he would, and that he does have something to do with it.

He said that there would be blood on the floor before the Union came in.

Groenwoldt testified that Cato used a slide presentation as he spoke to his group about comparative benefits.

Guss, without setting a date, testified on direct examination that he attended a meeting of all Brandywine facility employees at which Cato spoke. Guss was asked, and he testified:

Q. And then what did he say?

A. He was glad to be here; how is everybody doing, and then he said, "We don't need no other third party."

Q. Is this Cato or Cardamone you are telling us about?

A. Cato said, "We don't need no other third party come in here over my dead body."

(No party has made a motion to correct this last-quoted portion of the transcript.)

Guss further testified on direct examination that he attended a late-March meeting of the warehouse employees that was conducted by Cato, Schmitt, and Cardamone. About 60 employees were present. There was a slide projector presentation to show Montgomery Ward wages; one of the managers said that the union wages were "about the same." At some point during the meeting, according to Guss, "I said, 'Can I see some benefits on the Union,' and he [Cato] didn't have them present; he couldn't answer."

Respondent called Cato. Cato testified that in his earlier meeting, when he spoke to all of the Brandywine facility employees at once, he told them that he appreciated the hard work that they had been doing. Also according to Cato, he told the employees that "the company does not believe in third-party representation." When asked, on direct examination, if he said anything else about third-party representation at the first meeting, Cato replied, "I don't recall." Cato acknowledged that he referred to "blood on the floor" during his meeting with all employees, but he testified that he used word as part of the phrase "blood, sweat and tears on the floor"; Cato further testified that he used that phrase "in the

context of the hard work that those associates⁵ had done over the prior months."

Cato further testified that he held 10 to 12 meetings with groups of employees later in the spring. He testified that the purpose of the meetings was to explain the effect of signing a union authorization card and to answer certain claims by the Union. He used a slide projection show to compare benefits that Respondent was providing at the Brandywine facility with benefits under the Teamsters' contract at Respondent's Baltimore distribution center. Cato testified that he told the employees in the group meetings that authorization cards were legal documents and that, if over 50 percent of the employees signed them, the employees would be represented by the Union. Cato flatly denied telling the employees that Respondent would learn the identity of the employees who signed authorization cards. He did not deny telling any group of employees that the Union would be kept out if he had anything to do with it, as Groenwoldt testified.

On cross-examination Cato was referred to the group meetings; he was asked, and he testified:

Q. Didn't you, in fact, at least at some of these meetings say that it would be over your dead body before the Teamsters came in there?

A. I don't recall that.

Q. Might you have said that?

A. I do not recall that.

Lennox testified that he could not remember anything that Cato said at the first meeting. Lennox denied that, during the meeting which Cato conducted for the warehousemen, Cato stated that Respondent would find out who had signed union authorization cards, and Lennox denied that Cato said that the Union would get in only over "my dead body." Lennox acknowledged that some of the employees in the group of warehousemen asked questions of Cato and that Cato gave answers. Lennox did not deny that Guss, who worked under Lennox, asked for an exhibition of union benefits.

Schmitt was present at all meetings conducted by Cato, and he was called to testify by Respondent, but he was not asked by counsel for his recollection of Cato's speeches. When interrogated by the General Counsel pursuant to Rule 611(c) of the Board's Rules and Regulations, Schmitt testified that he could remember nothing that Cato had said, other than congratulating the employees on the hard work that they had done.

Credibility Resolutions

Schmitt is an obviously intelligent man, and he has known that these matters have been subject to charges since the charges were filed. I believe that he used the "I don't remember" dodge in an attempt to evade testifying about the misconduct of Cato, the high corporate executive who was his immediate boss.

Groenwoldt did not support Guss in Guss' testimony that, during the first meeting, the one that was attended by all employees, Cato made a reference to his "dead body." However, neither Cato nor Schmitt denied it. (Cato, incredibly, testified on cross-examination that he could not remember such a remark during the later, group, meetings, but he was

³In many of the long quotations that follow, I have, without notation, inserted punctuation and omitted extraneous expressions such as "like," "you know" and "okay."

⁴The transcript, p. 97, L. 12, is corrected to change "house" to "have."

⁵Respondent calls employees "associates."

not asked if he said such during the first, general, meeting. Also, Lennox's denial on this point was limited to what Cato said during the meeting of the warehousemen, not what Cato said in the first meeting to the entire employee complement.) I credit Guss and find that Cato told the employees that the Union would be recognized only over his "dead body."

Guss did not support Groenwoldt's testimony that, during the series of late-March group meetings, Cato told some employees that "there would be blood on the floor before the Union came in." However, it is to be noted Guss and Groenwoldt would not have attended the same group meeting because they worked in different departments (warehouse and shipping). I do not believe that Cato attempted to emulate Sir Winston by employing a reference to "blood" (with or without references to sweat or tears, or toil) to describe the effort involved in getting the operation going. If Cato had made such a dramatic remark, others (like Schmitt and Cardamone) would have been called to support him; none was. I credit Groenwoldt, and I find that during one of the group meetings, Cato said that there would be blood on the floor before the Union would be recognized at the Brandywine facility.

Contrary to the evasiveness of Cato and Schmitt about the "blood" and "dead body" statements, Cato clearly and unequivocally, and credibly, denied stating to any employees in any meeting that Respondent would be able to find out who signed authorization cards.

3. Union activities of Guss and Groenwoldt

On April 13, at a local motel, Union Organizer Archie Smith conducted the Union's first (and only) meeting of employees; three Brandywine facility employees attended and signed authorization cards at that meeting: Groenwoldt, Guss, and Brian Hollingsworth. Guss, Groenwoldt, and Hollingsworth took blank union authorization cards from Smith and agreed to distribute them among Respondent's employees. Smith testified:

[T]hey were interested in working, as a committee, to try to solicit other people, to pass out the authorization cards, and when . . . we got to that point and they said they were willing to do that, I . . . suggested to them that before they do that, they let me write the company a letter and let the company know that they were on a committee, before . . . they went out and started . . . soliciting cards, but they, for some reason, had a little fear. They didn't want the company to know, so I told them it was their call . . .

Smith complied with the employees' wishes; no such letter was sent.

During the next 3 days, Guss distributed some cards at breaks and after work (in the parking lot), but was able to get no employees to sign them. Groenwoldt did not distribute any authorization cards, but he testified that he did talk to some employees about the cards. Whether Hollingsworth distributed cards or talked to other employees about them is not disclosed by the record.⁶

There is no direct evidence that any of Respondent's supervisors had knowledge of the attempts by Guss and

Groenwoldt to distribute union authorization cards or talk to other employees about the Union, and the supervisors involved here denied such knowledge.

4. Discharge of Groenwoldt

a. Events before April 17

Groenwoldt was a loader at the distribution center dock. Each shipping department bay (also called a dock) is designated for a certain Montgomery Ward store that may be located anywhere between Pennsylvania and North Carolina. Each shipping lane that leads to a dock is similarly designated, i.e., the Waldorf lane leads to the Waldorf dock.

Clerks give order-fillers or warehousemen picking tickets for the merchandise that is to be taken to the dock, either by powered cart or by an overhead conveyer system. The order-filler finds the merchandise and places a picking ticket on it. The order-fillers take the larger merchandise to lanes leading to the loading docks using the powered carts. The order-fillers place smaller merchandise on an overhead conveyer system which takes it to the dock area.

If the loaders do not take merchandise from the overhead conveyer as it passes by their assigned loading docks, the merchandise continues to circulate through the system. Sometimes this causes no immediate problem, but sometimes the merchandise that is not removed backs up and fouls the entire conveyer system. A red light turns on when this happens, and the loader, and anyone who can help him, is required immediately to get the blockage undone.

As noted, the order-fillers place picking tickets on the merchandise before sending it, or taking it, to the shipping lanes. On each picking ticket is a bar code that can be scanned with an electronic "gun." Loaders are required to scan all picking tickets of all merchandise before placing it in truck trailers. When a ticket is scanned, a record is electronically made of what has been drawn from the distribution center's storage and what is being sent to each retail store.

When the distribution center opened, loaders were allowed to scan tickets of larger merchandise in the shipping lanes where the order-fillers would drop it. Respondent experienced some inventory control problems with that procedure, so, about April 1, Respondent caused to be painted on the docks, each at points proximate to points at which trailers were backed for loading, red, 2-foot by 4-foot rectangles (called "squares" by the witnesses). After the painting was done, all loaders were instructed to stop scanning the merchandise out in the shipping lanes; they were instructed to take the merchandise from the shipping lanes to red rectangles and scan the merchandise there. Then they are to take the merchandise inside the trailer as they had done before.

Groenwoldt admitted receiving group and individual instructions by the supervisors regarding the red rectangles. On direct examination he admitted attending a meeting on the dock conducted by Cato, Schmitt, and Cardamone. Groenwoldt was asked, and he testified:

Q. And what did they say?

A. They explained what the red square was for, about putting merchandise on the square and scanning it and placing it on the truck.

. . . .

⁶Hollingsworth did not testify.

Q. And what did you do after the meeting, did you utilize the red square?

A. Sometimes I did and sometimes I didn't.

Q. Well, why didn't you use the red square all the time?

A. Well, if my lane was backed up, I wanted to get my lane clear, so I scanned the big items out in the lane, then put them on the truck. Sometimes I did use it; sometimes I didn't. It all depended on how backed up my lane was. . . . [W]hen my lane gets backed up, it just makes that much more work for me to get clear.

Groenwoldt further acknowledged that, a few days after this group meeting, Schmitt and Cardamone approached him and "I was instructed on the use of the red square. . . . To [put] all merchandise on the floor, to put [it] on the red square, scan it and load it into the truck." The General Counsel then asked Groenwoldt if he thereafter followed these instructions. Groenwoldt replied that he did not. Groenwoldt testified that he continued to scan in the lanes "about 50% of the time" in order not to get behind and possibly having the red light (on the conveyer system) come on. (As detailed below, Cardamone acknowledged that he repeatedly cautioned the loaders not to allow the red light to come on.)

Groenwoldt also testified that he saw other loaders use the red rectangles "about 50% of the time."

There is no question that accurate scanning at the docks is a matter of great importance to Respondent's operations. Groenwoldt testified that he knew that if the picking tickets of loaded merchandise were not scanned, the distribution center inventory would not be "relieved," or debited, and the retail store would not be charged; nor would the retail store know that it had the merchandise.

Cardamone testified that during the first 6 months of its operations, the Brandywine distribution center had 10 times the level of unscanned labels that is normal for the Company's distribution centers, and a 6-month inventory revealed that \$300,000 of inventory loss was attributable to unscanned labels. Cardamone testified, without contradiction, that he regularly cautioned the loaders that they should always be diligent in "making sure your red lights are off, which means that your merchandise is flowing, making sure that you're that you're scanning your merchandise in the red square, and making sure that the red mark you put on your bar code indicating that it was scanned is facing out when you load it in the trailer so an auditor can check it."

Cardamone and Schmitt, the distribution center manager, testified that early in the week of April 13, they were walking in the dock area and saw Groenwoldt scanning a large piece of merchandise outside the red rectangle. Schmitt sent Cardamone over to remind Groenwoldt of the proper procedures. Cardamone testified, "I went directly over to him in the back of the trailer where he [Groenwoldt] was and explained to him the procedure for loading, our program, how serious the offense was."

Cardamone admitted on direct examination that, on April 12 or 13, he noticed one other loader, Izea Tate, who "scanned several items in his lane, not in the red square." When asked what he did about it, Cardamone testified:

I reprimanded him [Tate]. I told him how serious that was. I asked him if he understood our policies and I told him what could happen if he continued.

I went over our policy, where to scan. I was being very repetitious just to make point to him that he could be terminated if this happens again.

I made it sound extremely serious to him.

Cardamone again testified on cross-examination that when he saw Groenwoldt scanning in the shipping lane, he reminded him of the proper procedure, and he asked Groenwoldt if he understood his training, but he testified that he could remember nothing more about what he told Groenwoldt on that occasion. It is clear that Cardamone gave to Groenwoldt no warning similar to that which he had given Tate.

b. Events of April 17

Groenwoldt testified that, on the morning of April 17, Loading Supervisor Gottshall took Groenwoldt from his usual two loading docks and placed him at two others. Gottshall further told Groenwoldt that, at the end of the day, Cardamone wanted to see him.⁷ Groenwoldt further testified, without contradiction, that the two docks to which he was assigned on April 17 had a greater volume of traffic than did the two docks to which he was usually assigned. Groenwoldt further testified that he knew at the time that the two docks to which he was sent were subject to a surveillance by a closed-circuit camera system; Groenwoldt testified that he did not know if his usual docks were subject to surveillance.

The General Counsel asked Groenwoldt about the day he was discharged, and Groenwoldt testified:

Q. And what did you do that day?

A. Loaded the trucks.

Q. Did you use the red square every time you were supposed to?

A. No.

Q. About how frequently did you use the red square?

A. About 50% of the time.

Q. Did you observe the employees in the other lanes around you when they were loading?

A. Yes.

Q. Did you see them using or not using the red square?

A. They were using it sometimes; sometimes they weren't.

On cross-examination Groenwoldt admitted that he was busy "most of the time," but he insisted, "You can look to your left or your right, with a glance of your eye, and you can see them." Groenwoldt was not asked to name these other employees.

At the end of the workday, Gottshall collected Groenwoldt and took him to Cardamone's office. Gottshall and Groenwoldt entered Cardamone's office as Guss was leaving (after having been discharged, as discussed *infra*). When Groenwoldt entered Cardamone's office, Cardamone read to him the following notice of discharge:

Paul [Groenwoldt] is being separated due to his repeated violation [sic] of tailgate scanning procedures. On March 23, his supervisor covered the tail gate scanning procedure with Paul. On April 15 at 2:45 p.m. Jim Schmitt, facility mgr. and Mike Cardamone, operating

⁷ Gottshall did not testify.

mgr., observed Paul scan a high value master carton and carry [it] to the trailer. The carton was scanned in the lane and not in the designated red square. He was instructed at that time by both Mr. Schmitt and Mr. Cardamone as to the correct procedure. On April 16 a meeting of all shipping associates was held (Paul was in attendance) and the procedures of tail gate scanning were reviewed. On April 17th, another trailer meeting was held to cover the same topic. At 3:13 p.m. on April 17, Paul was observed by Mr. Jim Schmitt, loading merchandise on his trailer without tailgate scanning. This was repeated several times.

When Cardamone finished reading the notice, according to Groenwoldt, "I told them that I would try and do a better job, and he [Cardamone] told me, 'No, you won't.'"

Cardamone did not dispute Groenwoldt's testimony of what was said in the discharge interview, except that Cardamone, credibly, added that, when reading the notice:

After each sentence, I paused and asked him [Groenwoldt] if he understood it, if he had any questions about it, "do you agree or disagree," and he agreed to every sentence, sentence-by-sentence, throughout the entire document. And I asked him to sign it.

(Groenwoldt did sign the discharge notice, and he wrote "Teamsters" below his signature. Groenwoldt testified that, after signing the notice, he "pushed" it back to Cardamone and asked, "Is this the reason why I'm being fired?" When asked what Cardamone replied, Groenwoldt testified, "It sounded like 'uh-huh,' I'm not sure, though." Whatever sound he made, there is no evidence that Cardamone read the word "Teamsters" before he made it. Moreover, assuming that Cardamone was responding to Groenwoldt's question in the affirmative, it is at least equally inferable that Cardamone was indicating that the reason listed on the warning notice was the reason that Groenwoldt was being discharged.)

Schmitt testified that he has in his office a monitor for a closed-circuit television security system. Schmitt testified that he can see, "anywhere within the building, inside and out, except the office area and the restrooms." Further according to Schmitt, on April 17:

I happened to observe that afternoon, Friday afternoon, Mr. Groenwoldt not scanning in the red box. In fact, I don't know where he was scanning. . . . I said to Mike [Cardamone], "Terminate Mr. Groenwoldt."

Schmitt, who was presumably watching all loaders,⁸ was not asked if, as Groenwoldt testified, other employees also marked large merchandise outside the red rectangles on April 17.

Cardamone testified that, on receiving the order to discharge Greenwoldt, he prepared the discharge notice quoted

above, called Groenwoldt and Gottshall into his office, and discharged Groenwoldt, as described above.

The parties stipulated that the files of Groenwoldt contain no records of any types of warnings; Groenwoldt testified that Gottshall frequently told him that he was doing a good job.

5. Discharge of Guss

a. Events before April 16

Guss was an order-filler, or warehouseman, at the Brandywine distribution center. At the time of his discharge, there were two group leaders working under Supervisor Lennox in the warehouse: Ruth Culver and Pat Proctor.

Respondent contends that Guss was discharged on April 17 because: (1) he would not follow instructions issued by Culver; (2) he was too slow in filling orders (or picking merchandise); (3) he lost a picking ticket about 3 weeks before he was discharged; and (4) on the day of his discharge, Guss lost two more picking tickets.

Lennox testified that the approximately 16 order-fillers at the distribution center fill 1500 to 3000 orders per day. A clerical gives tickets to order-fillers, and an accounting of how many pieces per hour each order-filler "pulls" is maintained. When an order-filler is given tickets, he is required to put his initials on it.

Tickets do get lost. Lennox testified that he had been reminded on a daily basis, by an "unscanned label report," that lost tickets were a problem. Lennox testified that when lost tickets were found:

The general procedure was to bring it [a lost ticket] to the supervisor which that ticket would have been assigned from, and then that supervisor [was] to follow up on that ticket and try to identify who it belonged to ensure that the merchandise was pulled, and then take whatever steps [were] necessary to reinforce to associates the importance of the tickets.

Lennox testified that he conducts daily meetings of the order-fillers, and "at least twice a week" he covers the topic of lost picking tickets. In those meetings Lennox tells the order-fillers to think of picking tickets as customers, and "that it is the associate's responsibility to keep track of the tickets assigned to them." Lennox further testified that, "on a daily basis," he and Cardamone discussed "[w]ays in which we could identify who the tickets belonged to, how we could reduce that [unscanned label] report."⁹

Lennox testified that some 3 weeks before Guss was discharged, a ticket bearing Guss' initials was brought to him. Lennox testified that he then told Guss "that he needed to keep more control of the tickets . . . and that he was responsible for his own tickets."

Lennox testified that he kept track of how many pieces per hour each order-filler filled by adding up the number of tickets given to them in a day, subtracting breaktimes, and dividing by the number of hours that the order-filler was supposed to be working. Statistics were not kept on an order-filler if he was given any other assignments during the day. Lennox testified that he had established a goal of 30 pieces per hour

⁸The General Counsel does not allege that Schmitt's surveillance of Groenwoldt's loading practices is a case where the employee's misconduct was discovered during an investigation undertaken because of the employee's protected activities. Cf. *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121-122 (1979).

⁹The transcript, p. 380, L. 14, is corrected to change the question mark to a period.

for the order-fillers, and he told the order-fillers that in a group meeting, but he acknowledged that "some" of the order-fillers had not reached that speed in April 1992. Lennox testified that he thought Guss' "pieces per hour were lower than I thought was what he was capable of doing." Lennox testified that, at some point, he determined that Guss was picking 16.08 pieces per hour, but he should have been picking 20 to 25 pieces per hour by that point.

Lennox also testified about the third area of alleged difficulty with Guss, Guss' dealings with Culver. Culver became a group head on March 30; prior to that date, she was an order-filler, as was Guss. Lennox testified that, "on occasion" Culver would indicate to him that "she was having problems getting [Guss] to follow her instructions." Lennox told Culver to handle the problem "on her own level" because "if I intervened, I thought that might take away from her status as group head. . . . I wanted her to use her own style." Lennox testified that he checked with Culver at some point later, apparently before April 16, but: "she reported to me that she was still having difficulty."

Culver testified that "I generally had to ask Dennis two to three times to get a task performed." When asked specifically how often this happened, Culver replied, "daily." She testified that she experienced that problem with none of the other six order-fillers under her. Culver testified that "from time to time" she told Lennox of the troubles she was having with Guss; Lennox told her to talk to Guss herself, and she did so. Culver was asked on direct examination, and she testified:

Q. When did you have a talk with Mr. Guss?

A. I can't give you an exact date.

Q. It was after you became a group head?

A. Yes, ma'am.

Q. And where you when you had a talk with Mr. Guss?

A. In the warehouse, on the floor.

Q. Was anyone else present when you had this talk?

A. No.

Q. What did you say to Mr. Guss and what, if anything, did he say to you?

A. I just explained to him that I wasn't trying to be hard-nosed with him, that we just needed to have the merchandise brought up as close to the shipping lanes as possible, to have it stacked neatly and safely, and that when the items . . . were coming back from the other stores, we needed to have them put away as quickly as possible. . . . I don't recall word for word, but he [Guss] basically said that he would try to get it done.

Q. Did any of the everyday work situations change after that discussion?

A. No, ma'am.

Guss admitted that an exchange of this nature occurred, but, as discussed later, he specifically placed it after a meeting on April 16.

b. Events of April 16

Lennox testified that during the morning of April 16, the day before the discharges, he called a meeting of Guss and Culver in his office. According to Lennox:

I spoke with both of them about the problems that were occurring. Ruth [Culver] was having trouble getting Dennis [Guss] to do what she instructed him to do.

I put the issue out on the floor and asked them for their comments. . . .

[Culver said that] she was having difficulty. She would instruct him to do something and it seemed that there was a lackadaisical attitude towards getting that done. . . .

Mr. Guss said that he was helping other people in the shipping department and that he had taken tickets from other order-fillers.

I reminded him that it was his responsibility on the productivity portion of it to make sure that the sign-out clerk knew how many tickets he took from someone and that it was not his responsibility to load trailers, that it was his responsibility to pull orders.

Lennox testified that he told Guss during the meeting of April 16, that Guss had been "pulling" 16.08 pieces per hour, and that "I needed him to be pulling between 20 and 25 pieces per hour."

Lennox testified that he could not remember any response by Guss to any comments that were made in the meeting, other than the one quoted immediately above. Lennox further testified that Culver left his office before Guss on April 16. As Guss left the office, according to Lennox, "I told him that I still hadn't made a decision on what to do about this matter."

Culver testified that in the April 16 meeting, Lennox told Guss that

we all need to work together as a group, that I was his group head, basically his right arm, and that we needed to work together and get everything done in a timely manner.

Culver testified that Lennox mentioned productivity sheets, but she could not remember what was said.

Neither Lennox nor Culver testified that, during the meeting of April 16, there was any mention of the picking ticket that Guss had, as Lennox testified, lost about 3 weeks before.

c. Events of April 17

Guss admitted that, during the morning of April 17, he misplaced two picking tickets. He testified that he was looking for them when he was approached by Culver who handed the tickets to him without comment. He then pulled the merchandise and continued his other duties. Guss testified that, within an hour of his quitting time on April 17, Culver asked him to work overtime the next day. That testimony was not denied.

Culver testified that on April 17 another employee found two tickets that had been initialed by Guss and brought them to her. Culver testified that she photocopied the tickets and brought the originals and the copies to Lennox.

On cross-examination Culver was asked, and she testified:

Q. Can you tell me why you xeroxed the tickets that were given to—the lost tickets?

A. That was also part of the procedure, the way I understood it, that they were to be copied and a copy was to be given to [Lennox] and then he would handle the

disposition of the tickets, getting them back or reissued to someone else for re-pull.

...

Q. Had you made copies of other tickets previously?

A. If the tickets had identifiable initials, I believe I had before, but I don't—I cannot recall. Truthfully, no, ma'am. I can't recall ever.

Q. Have you ever found lost tickets before?

A. Yes, ma'am.

Q. How frequently?

A. It would differ from day to day. . . . Some days you would find maybe one or two [that] would be turned in and sometimes you could go a week and none would be turned in.

Q. Are the order-fillers supposed to put their initials on the tickets?

A. Yes, ma'am.

Q. And why would you have a ticket that didn't have initials on it?

A. Because some people don't follow the rules all the time.

...

Q. Did you and [Lennox] ever discuss who was losing the tickets?

A. For the tickets that were identifiable, we'd just . . . remind the order-filler to be very careful with them and to make sure all of them were filled.

Culver was asked to name some of the other order-fillers who had been identified as having lost tickets. After two rounds of evasive answers, Culver testified that she could not remember.

After he got the copy (and/or the originals) of the picking tickets, Lennox called Guss into his office. According to Lennox:

I, again, reminded him of the importance of the tickets and—I don't recall exactly what was said in this meeting, but I told him they were found on the floor and that's all I can remember, the gist of it.

As I shall discuss later, Lennox testified that immediately after giving the picking tickets to Guss, he went to see Cardamone.

At quitting time, Guss was paged to Lennox's office. When he got there, according to Guss, Lennox asked him to step outside for a cigarette. When they finished their cigarettes, they returned to Lennox's office. Further according to Guss:

He [Lennox] was shaking, and he said, "This is from—the man up above. [Lennox] said, "I have to let you go."

I'm like, "This is bull shit."

He goes, "I know it is bull shit, but the man up above said I have to let you go."

Respondent does not dispute that the expression "the man up above," if used, was a reference to Cardamone; at any rate, Guss and Lennox testified that, after being told that he was discharged, Guss immediately asked if he could talk to Cardamone, and Lennox did not ask Guss why he wanted to do so.

Guss and Lennox then proceeded to the area of Cardamone's office. Lennox went into Cardamone's office and left Guss outside momentarily. Guss was then called in.

Guss testified that, in Cardamone's office, he told Cardamone that other employees had made some mistakes, but they were given other chances; he mentioned specifically an employee who had operated some machinery dangerously; she was merely assigned to another machine. Guss asked Cardamone why he could not have another chance like that employee. Further according to Guss, Cardamone replied, "Nope, you're gone, bye."

d. *The decision to discharge Guss*

Lennox testified on direct examination that, after someone, whom he did not then name, brought him the two lost picking tickets on April 17, he went to Cardamone to discuss the difficulties that he had been having with Guss. According to Lennox:

Mr. Cardamone asked me questions as to what I would want in my own operation, is this the kind of person that I would want in my organization, questions of that nature.

I smiled to him and I had made my decision that I was going to terminate Mr. Guss.

Lennox further testified that, at the end of the workday, he took Guss outside, "so that we would have some privacy." Outside, Lennox told Guss that he had decided to terminate Guss for three reasons which he also wrote on a discharge memorandum: "failure to follow instructions, productivity, [and] lost tickets."

Lennox testified that he and Guss returned to Lennox's office where Guss said that there must be another reason for the discharge, and that he wanted to talk to Cardamone about his discharge. Lennox went to see Cardamone; Lennox told Cardamone that he was terminating Guss and that Guss wished to speak to Cardamone. When the three were in Cardamone's office, Cardamone read aloud a section of the personnel manual that probationary employees may be terminated for any reason. Lennox did not deny that when he, Guss and Cardamone were in Cardamone's office, Guss asked for another chance to perform satisfactorily, as Guss claimed in his testimony.

On cross-examination by the General Counsel, Lennox testified that it was Frances Robinson, a group head in the re-shipment department, who brought Guss' picking ticket to him. When asked what he then did with the tickets, Lennox replied, "I had Ruth Culver make a photocopy of them and I brought them to Mr. Guss' attention."

Although Lennox insisted at trial that it was his decision to discharge Guss, on cross-examination by the Union Lennox acknowledged that his pretrial affidavit states:

It was ultimately Mr. Cardamone's decision. . . . After Mr. Cardamone told me we would discharge Guss, I went and found Guss and took him outside.

Cardamone testified consistently with the direct examination of Lennox about how the decision to terminate Guss was made (that it was Lennox's idea, and Cardamone served only as a sounding board). Cardamone acknowledged that, in his office, Guss argued that other employees "were doing these

things and weren't reprimanded for them." Cardamone did not deny that Guss asked for another chance, and that Guss argued that other employees had been given such other chances.

Credibility Resolutions

Lennox and Culver could not keep their stories straight about how the tickets were found and the copies were made. Culver testified that some other employee found the ticket and brought them to her, and that she made copies, and then gave them to Lennox, because she thought that was "the procedure." Lennox testified that Frances Robinson (apparently an employee) found the tickets and gave them to him; he gave them to Culver and told her to make copies; and he gave the originals to Guss, but he could not remember what he said to Guss when he did. Because Guss admitted the loss of the picking tickets, a credibility resolution on the point is not necessary. The conflict, however, demonstrates that there was no "procedure" ("general" or otherwise) that called for making copies of picking tickets that had been found. The conflict, however, demonstrates that Respondent was going through an extraordinary exercise in case building when it was documenting Guss' (admitted) error in losing the picking tickets.¹⁰

There is a substantial credibility conflict between Lennox and Guss concerning what Lennox told Guss when he announced the discharge. Guss was credible in his testimony that Lennox said that he knew that the discharge was (or the stated reasons were) "bull shit," but "the man upstairs," i.e., Cardamone, had told him to discharge Guss. Moreover, Guss' testimony is perfectly consistent with Lennox's statements in his pretrial affidavit, which I credit,¹¹ that Cardamone ordered the discharge. I find that Lennox admitted to that Cardamone had ordered Guss' discharge, and the reasons being given for it, were "bull shit."

Other Testimony

On cross-examination, Guss testified that he did not remember losing any tickets other than those he lost on April 17. (The General Counsel did not ask him if, in fact, he had lost a ticket prior to April 17.)

Guss testified that "quite a few times" during his employment "Todd Lennox said I was doing a very good job." Guss further testified that, about 3 weeks before he was terminated:

He [Lennox] told me to work with this guy, the guy that knocked over the ranges, 12 of them, and totalled them, he had me—Todd said, "Would you work with him today and let me know how he does?"

Guss amended this statement by adding that the other employee "[k]nocked over 12 stoves and totaled half of them because I picked them up." None of this testimony was denied by Lennox. Guss also testified that he was asked to

work overtime almost every week, and only a few employees were ever asked to work overtime. Lennox and Kick testified that almost all employees were asked to work overtime, and they did so, but Respondent introduced no records in support of that conclusionary testimony; I credit Guss.

On cross-examination Guss denied that Culver gave him instructions on a daily basis. Guss testified that no one ever told him that Culver was a group head, and he usually worked under Proctor. Guss further testified that Culver gave him instructions only "[a] couple of times." One of these times, according to Guss, was an instruction to return to stock certain merchandise that had been returned from a store; another was an instruction to stack merchandise higher in the lanes. Guss testified that he complied with both instructions. I credit all of this testimony by Guss.

Guss also testified that, after the April 16 meeting, when Lennox was not present:

She [Culver] came up to me and said, "You probably think I'm a bitch."

I said, "No, I don't."

I said, "I'll start stacking merchandise, but they're just going to tell me—"

She said, "Okay, everything is fine."

I said, "It's fine with me."

Although Culver testified that "I can't give you an exact date" of the conversation in which she told Guss that she "wasn't trying to be hard-nosed with him," it is obvious that this conversation, as described and dated by Guss, is the same conversation described by Culver. Culver knew that Guss was discharged the next day, in part, for supposed multiple failures to follow her orders that preceded the April 16 meeting. And it is obvious to me that Culver gave consciously false testimony when she testified that "I can't give you an exact date" of the conversation in which she and Guss reached agreement about the future. I find that the conversation occurred after the meeting of April 16, as testified to by Guss.

Guss further testified on cross-examination that it was only once before April 16 that Lennox spoke to him about his pieces per hour. Guss testified that he told Lennox that the rate for which Lennox was giving him credit (about 16 pieces per hour), was "pretty good" because Todd also gave him other things to do in addition to pull merchandise; also, Guss told Lennox that Lennox's figures did not take into account that many times, the equipment to which Guss was assigned was being used by other employees. Guss testified that Lennox agreed with these observations about the pieces per hour calculations for him. Lennox did not deny this testimony.

Lennox testified that "I might take some [work] from somebody else and give it to the order filler, leaving the responsibility for productivity to that order-filler to tell my sign-out clerk so she could document it for them." However, Lennox did not testify that, at any time before April 16, he told the order-fillers, Guss or any other order-filler, that he was "leaving the responsibility" to them. Indeed, Lennox testified to only one conference with Guss that concerned pieces per hour, that of April 16.

As noted, Lennox testified that lost picking tickets had been a chronic problem, even before Guss lost two of them

¹⁰ For possible purposes of review, I here state that I credit Guss' testimony that Culver gave him the tickets without comment; and I discredit Lennox's testimony that he gave the tickets to Guss (but could not remember what he said when he did so, although he had previously told Guss, at the end of the April 16 meeting, in effect, that termination was being contemplated).

¹¹ See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

on April 17. On cross-examination Lennox was asked, and he testified:

Q. Did you make an attempt to do anything about the lost tickets?

A. What I attempted to do was reenforce to the associates that worked for me the importance of these tickets and that they should regard them [each ticket] as a customer.

Q. Were there occasions, other than the occasion involving Mr. Guss, where lost tickets were found?

A. Tickets were found, but I was unable to identify who they belonged to.

Q. On no occasion were you ever able to identify who tickets belonged to that were found?

A. Not of the lost tickets, that's correct, at that time.

JUDGE EVANS: You mean Guss' tickets were the first ones you were ever able to identify?

THE WITNESS: To identify, yes, sir.

JUDGE EVANS: Next question.

By Ms. Anderson:

Q. About how many lost tickets had been found up to the time when Guss's tickets were found?

A. I would say between 10 and 15 . . . total.

Respondent called Sandra Kick, a personnel specialist, who testified that several probationary employees were terminated in 1992 and that Hollingsworth (the third employee who attended the April 13 union meeting) is still employed.

B. Analysis and Conclusions

1. The 8(a)(1) allegations

The complaint, paragraph 5, alleges that, in violation of Section 8(a)(1), on or about March 9, Cato: (a) told the employees that Respondent would learn the identity of those who signed union authorization cards; (b) told employees that strikes and violence would inevitably result if they selected the Union as their collective-bargaining representative; and (c) told the employees that it would be futile for them to select the Union as their collective-bargaining representative.

I have found above that Cato did not tell the employees that Respondent would discover the names of those who signed authorization cards. I have found that Cato told the Brandywine facility employees that the Union would represent the employees only over his "dead body," and that there would be "blood on the floor" if the Union made the attempt. While these remarks, by the ultimate supervisor of over 7000 employees, bespeak of the rawest variety of antiunion animus, they do not fall within the categories of violations alleged, and, on brief, the General Counsel, does not contend that they do.

Accordingly, I shall recommend dismissal of these 8(a)(1) allegations of the complaint.

2. The 8(a)(3) allegations

The threshold issue is whether the General Counsel has presented a prima facie case that Guss and Groenwoldt were discriminated against because of their union activities; that is, the Board must first decide whether the General Counsel has shown that Guss and Groenwoldt have been discharged, that

Respondent bore animus against their union activities when it discharged them, and that Respondent knew Guss and Groenwoldt had engaged in union activities at the time of the discharges. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The discharges are admitted; animus has been found; the issue is whether Respondent can be charged with direct, or inferential, knowledge of the union activities of Guss and Groenwoldt despite the fact that knowledge is denied.

As Union Organizer Smith testified, Guss and Groenwoldt told him not to send a letter to Respondent identifying them as members of an organizing committee because, "[t]hey didn't want the company to know."

At the hearing I asked counsel to brief me on the effect of *Pizza Crust Co.*, 286 NLRB 490 (1987). I noted on the record that in that case, as here, the alleged discriminatees sought to keep their union activities secret from their employer.¹² In *Pizza Crust*, supra, as here, three employees were the core inside organizers. As here, they determined to keep their union activities secret, at least to the extent possible. Two of the three employees were discharged immediately after distributing authorization cards for a union. The administrative law judge, after extended discussion, found that the grounds asserted for the discharge were "incredible," but he recommended dismissal of the 8(a)(3) allegations because there was no evidence of animus or knowledge. In his refusal to impute knowledge in the face of the employer's denials, the law judge relied on the fact that the employees had been instructed by their union representative to keep their activities a secret, and the employees testified that they attempted to follow that instruction. As stated, at 286 NLRB at 495:

Such an instruction would greatly diminish, if not completely extinguish, the chance that an employer would find out about union activity until the union involved chose to make that activity known.

The Board, with Chairman (then Member) Stephens dissenting, affirmed the judge's recommended dismissal. (The dissent relied, inter alia, on the judge's finding that the reasons given for the discharges were "incredible.")

The only element of *Pizza Crust*, supra, that I mentioned at trial was the fact that the employees there, as here, decided to keep their union activities covert. However, counsel for the General Counsel, on brief, does not mention the decision of Groenwoldt and Guss to keep their union activities covert, apparently conceding that this case and *Pizza Crust*, supra, are indistinguishable on this critical point.

Counsel for the General Counsel attempts to distinguish *Pizza Crust*, supra, only on the ground that she does not here argue a "small plant theory" under *Weise Plow Welding Co.*, 123 NLRB 616 (1959), as the General Counsel did in *Pizza Crust*, supra. This is a distinction without a difference; the General Counsel is still requesting that knowledge be imputed, and the factor of the employees' engaging in only covert union activity must be addressed.

For a theory of imputed knowledge, the General Counsel argues a "confluence of circumstances" theory that was ar-

¹² Tr. 433.

culated in *Abbey's Transportation Services*, 284 NLRB 698 (1987). To do this, the General Counsel necessarily employs the artifice of ignoring the element of covert activity involved here, and no further discussion on the point is really warranted. Setting aside for the moment, however, that which cannot be set aside for an instant, *Abbey's*, supra, is nevertheless distinguishable.

In *Abbey's*, supra, two employees were also discharged immediately after engaging in union activities. However, that activity was far more substantial than the minimal, unsuccessful, talking that Groenwoldt and Guss did here. The employees in *Abbey's*, supra, secured 31 union authorization cards in a unit of 63 employees, and they got 22 of the unit employees to attend a meeting. Immediately after the union filed a Board petition, the employer called them into the office and discharged them, together, for alleged misconduct that antedated their union activity. The Board found knowledge from the circumstances, noting, inter alia, that the discriminatees

as the prime movers of the organizational effort, had made substantial progress in card-signing and in generating attendance at a Union organizational meeting.

Here, the card signing and meeting attendance involved only 3 employees in a unit of up to 200 employees. And the progress after the April 13 union meeting was not "substantial"; it was nonexistent.

Moreover, in *Abbey's*, supra, the Board heavily relied on the fact that, for no plausibly legitimate reason, the employees were called into the locus of managerial authority for discharge together. Here, assuming that Groenwoldt was "set up" on April 17 by having him moved to a busier shipping lane,¹³ Guss would not (at least according to this record) have found his way to Cardamone's office on the same date if he had not, on that date: (1) lost two picking tickets, and (2) asked to go to Cardamone's office. That is, assuming that Respondent was searching for pretexts to discharge both Guss and Groenwoldt, Respondent did not, as did the employer in *Abbey's*, supra, create the element of timing unilaterally.

Finally, in *Abbey's*, supra, the "confluence of circumstances" did not include the circumstance of covert union activity by the alleged discriminatees, and this case does.

Counsel for the Charging Party attempts to distinguish *Pizza Crust*, supra, on the fact that, in that case, the employer had no notice that any union activities were being conducted by any employees. Although this is an accurate statement of what was found in *Pizza Crust*, supra, the lack¹⁴ of knowledge that any union activity was afoot was held relevant only on the issue of whether a wage increase was granted in order to interfere with a known organizational at-

tempt.¹⁵ Moreover, the Board has never held that knowledge of some union activity by some employees creates a presumption of knowledge of the protected activities of any employee who engages in protected activities and who is discharged for pretextual reasons. If ever such a presumption is created, it is unlikely that it will cover employees such as Groenwoldt and Guss who engaged only in minimal union activities and who did so covertly.

Clearly, Groenwoldt was the victim of discrimination. Groenwoldt was totally without justification when he simply ignored Respondent's instructions to scan large merchandise only in the red rectangles, even if other employees did it.¹⁶ However, when Cardamone saw Izea Tate marking merchandise outside the red rectangle, he warned Tate that he could be discharged for such. When Schmitt saw Groenwoldt marking merchandise outside the red rectangle, he ordered Cardamone to discharge Groenwoldt. Then Cardamone did so, necessarily knowing that Groenwoldt had not gotten the categorical warning of which Tate was given the benefit.¹⁷

Clearly, Guss was the victim of discrimination. Respondent wants it both ways: bringing a halt to lost picking tickets was absolutely imperative, as evidenced by almost daily conferences (among supervisors and employees); however, Respondent (although it is a sufficient organizational acumen to operate a \$25-million inventory, 200-employee, 600,000-square-foot warehouse) could not find a way to detect any employee who lost tickets, except Guss. (And Guss was "caught" only because he followed instructions and placed his initials on his picking tickets.) The defense for the discharge of Guss was a fabrication of the first order, as acknowledged by Lennox to Guss, and the testimony in support the fabrication was undoubtedly perjurious.

In summary, the other indispensable elements of a violation under the Act, animus and discriminatory treatment, are present. Nevertheless, as in *Pizza Crust*, supra, the incredible defenses do not substitute for the missing, indispensable, element of knowledge of the the alleged discriminatees' protected activities.

Accordingly, I am constrained to conclude that the General Counsel has failed to prove that Guss and Groenwoldt were discharged in violation of Section 8(a)(3), and I am forced to recommend that these allegations of the complaint be dismissed.

[Recommended Order for dismissal omitted from publication.]

¹⁵ On brief, p. 18, counsel for the Charging Party also attempts to distinguish *Pizza Crust*, supra, by stating: "In addition, the Board found that the Respondent had legitimate reasons for discharging the employees." This statement is false. The judge entered an extended discussion on the point, and he concluded that the asserted discussion on the point, and he concluded that the asserted reasons for the discharges in were "incredible." Moreover, the dissent (on which counsel relies) based its opinion on the fact that the judge had held the defenses to be "incredible." Hopefully, the misstatement by counsel for the Charging Party was made only through lack of care.

¹⁶ Not one employee had been disciplined for letting the red light come on, Groenwoldt's alleged sole alternative to following instructions.

¹⁷ It is a virtual certainty that, if Tate had passed his probationary period and was entitled to a warning on that basis, Respondent would have brought out the fact.

¹³ This was the clear implication of Gottshall's warning to Groenwoldt that, at the end of the day, Cardamone wanted to see him.

¹⁴ Strictly speaking, there was no known employee activity here, either. Respondent knew that the Union was campaigning at the gate, but there is no evidence that Respondent knew that any employees were campaigning inside (or anywhere else).